

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HENRY WARE, II,

Defendant-Appellant.

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UNPUBLISHED

November 26, 2002

No. 236067

Oakland Circuit Court

LC Nos. 00-170554-FH

00-170555-FH

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and sentenced, as a third habitual offender, MCL 769.11, to six months in jail and lifetime probation. Defendant appeals as of right. We affirm.

Defendant's convictions stem from two undercover drug purchases conducted in the parking lot of an Oakland County convenience store. On appeal, defendant first argues that the trial court erred in failing to strike, as the product of an unduly suggestive pretrial lineup procedure violative of due process, Officer Christopher Schwartz' in-court identification of defendant as the person from whom he purchased the drugs. In doing so, defendant asserts that Schwarz' viewing of a computer-generated photograph of defendant prior to the lineup tainted the lineup identification as well as the identification at trial. We disagree.

A trial court's decision regarding identification evidence will not be overruled unless it is clearly erroneous. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). In order to establish that an identification procedure denied him due process, a defendant must show that the pretrial identification was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

Factors to consider in evaluating the likelihood of misidentification include:

“the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” [*Kurylczuk*,

*supra* at 306, quoting *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

With respect to the first of these factors, we note that in addition to having met defendant on a previous occasion, Officer Schwartz had an excellent opportunity to view defendant at the time of each crime. According to his testimony, on both occasions Schwartz watched defendant as he approached the undercover vehicle on foot across an amply lit parking lot. Defendant then sat next to defendant in the passenger seat of the officer's car for up to two minutes while the two engaged in a drug transaction followed by a short conversation. Schwarz then was able to watch as defendant left the vehicle and walked away after the transactions were complete. These facts do not support a substantial likelihood of later misidentification.

The degree of attention paid by Schwartz similarly weighs against the likelihood of misidentification. Although the time spent with defendant was arguably short, Schwarz was not a lay witness but rather an experienced narcotics investigator who likely knew that he may later have to identify defendant as the man who sold him the drugs. See *People v Davis*, 241 Mich App 697, 704; 617 NW2d 381 (2000). Moreover, while the officer failed to note a facial scar when describing defendant in his police report, there is no indication that the remainder of the officer's description of the offender as a short and stocky, young black male with braided hair was not accurate. Schwarz was also very confident in his identification of defendant, stating he had "no doubt" that it was defendant who sold him the cocaine on both occasions at issue. Finally, although there was a five-month period between the time of Schwarz' last meeting with defendant and his identification of defendant at the lineup, we note that the officer first identified defendant through the photograph database less than one month after the crime. On the basis of these facts, we do not conclude that Schwarz' viewing of the photograph before entering the lineup was so suggestive as to lead to a substantial likelihood of misidentification. Accordingly, the trial court did not err in declining to strike Schwarz' in-court identification of defendant as the person who sold him the drugs.

Defendant next argues that his counsel was ineffective for failing to (1) challenge the "legality" of the lineup before trial, (2) interview or call surveillance officers to testify in support of a misidentification defense, and (3) file and have heard a motion to dismiss on speedy trial grounds. Again, we disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

In light of our conclusion that the pretrial lineup identification of defendant was not unduly suggestive, defendant's claim of ineffective assistance based on counsel's failure simply to raise the issue before trial must fail. Defendant offers nothing to suggest that an earlier challenge to the admissibility of this evidence would have resulted in an outcome different than that actually achieved.

Defendant's claim that counsel was ineffective for failing to interview or call as witnesses several officers who allegedly conducted surveillance during the undercover drug buys must similarly fail. In order to establish ineffective assistance of counsel for failure to call witnesses or present other evidence, a defendant must show that the failure deprived him of a substantial defense, i.e., a defense that might have made a difference in the outcome of the proceedings. *People v Duff*, 165 Mich App 530, 547; 419 NW2d 600 (1987). Because, however, the record is silent regarding the substance of any testimony these witnesses would have offered if called at trial, defendant has not shown that a reasonable probability exists that, had counsel interviewed and called these witnesses, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel"). Moreover, defendant has failed to refute the presumption that his trial counsel elected not to call these witnesses, who were originally scheduled to testify for the prosecution, as a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Finally, because we find no basis in the record for concluding that the nineteen-month<sup>1</sup> delay between arrest and trial resulted in any prejudice to defendant, we reject defendant's claim that his trial counsel was ineffective in failing to move for dismissal of the charges on speedy trial grounds.

When determining whether a defendant has been denied his constitutionally guaranteed right to a speedy trial, the length of the delay is but one factor this Court must consider. See *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). More crucial to the determination is whether the defendant suffered prejudice as a result of the delay. *Id.* For purposes of a speedy trial claim, a defendant can experience two types of prejudice while awaiting trial; prejudice to the person resulting from oppressive pretrial incarceration, and prejudice to his defense as demonstrated by the unavailability of witnesses or other impairment to a defense. *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997); *People v Ovegian*, 106 Mich App 279, 285; 307 NW2d 472 (1981). While a delay of more than eighteen months is presumptively prejudicial, and shifts the burden of proving a lack of prejudice to the prosecution, *Cain, supra*, we are satisfied that the prosecution has met its burden in this case. As argued by the prosecutor, the record suggests that defendant was incarcerated for only a short amount of time between his arrest and trial, twenty-seven days to be exact. Moreover, all relevant evidence was properly preserved and there is no indication that any witnesses were unavailable to testify as a result of the delay.

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<sup>1</sup> Although the reasons for and exact length of the delay at issue here are not clear, the record suggests a period of between eighteen and nineteen months' delay between arrest and trial. Because unexplained delays are generally attributed to the prosecution, see *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985), we accept the latter as the period of delay for purposes of this appeal.

Furthermore, given that the passage of time aided counsel in presenting a defense premised on misidentification, defendant has failed once again to overcome the strong presumption that counsel's actions were a matter of trial strategy. *Mitchell, supra*.

We affirm.

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra